

MEMORANDUM OF UNDERSTANDING

by and between

THE NATURE CONSERVANCY

and

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

MILL CREEK

This California Endangered Species Act Memorandum of Understanding ("CESA MOU") is made and entered into by and between The Nature Conservancy (hereinafter called TNC) and the California Department of Fish and Wildlife (hereinafter called the "CDFW").

The purpose of this CESA MOU is to provide a framework for cooperative activities and monitoring that involve or address issues of importance to spring-run Chinook salmon (*Oncorhynchus tshawytscha*) in Mill Creek, eastern Tehama County. This CESA MOU provides for take associated with actions taken by the CDFW or TNC to rescue and relocate Chinook salmon or assist with increasing flows in the creek for the benefit of spring-run Chinook salmon as management activities under authority of Section 2081(a) of the California Fish and Game Code.

RECITALS

WHEREAS, the CDFW has jurisdiction over the conservation and protection of fish, wildlife, and native plants and their habitats necessary for biologically sustainable populations of those species and holds those resources in trust for the people of California (California Fish and Game Code Section 1802).

WHEREAS, spring-run Chinook salmon are classified as a threatened species by the State of California Fish and Game Commission pursuant to the California Endangered Species Act (CESA, Code section 2050 et seq.).

WHEREAS, Fish and Game Code section 2080 prohibits the import, export, take, possession, purchase or sale of any species, in whole or in part, that has been listed as threatened or endangered by the California Fish and Game Commission. Take is defined in Fish and Game Code section 86 as 'hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill.' However, Fish and Game Code section 2081(a) allows CDFW to authorize take and other acts prohibited by Fish and Game Code section 2080 for scientific, educational, or management purposes. This CESA MOU authorizes a limited level of take of spring-run Chinook salmon for management

purposes.

WHEREAS, Fish and Game Code section 5937 states, "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in absences of a fishway, allow sufficient water to pass over, around or through the dam to keep in good condition any fish that may be planted or exist below the dam..."

WHEREAS, salmonid presence shall be defined by reviewing historical records and utilizing current fisheries monitoring on Deer, Mill, and Antelope creeks and the Sacramento River between the Red Bluff Diversion Dam and the confluence of Clear Creek.

WHEREAS, on January 17, 2014, Governor Brown issued a proclamation, declaring the state to be in an emergency due to the drought conditions.

WHEREAS, on April 25, 2014, Governor Brown issued an Executive Order directing state agencies to, in part, work with other state and federal agencies and with landowners in priority watersheds to protect threatened and endangered species and species of special concern and maximize the beneficial uses of scarce water supplies, including employment of voluntary agreements to secure instream flows, relocate members of those species or take other measures.

WHEREAS, on December 22, 2014, Governor Brown issued another Executive Order declaring a continued state of emergency due to drought conditions, extending many of the terms of the April 25, 2014 Executive Order until May 31, 2016.

WHEREAS Mill Creek provides many important surface water beneficial uses, including agriculture, recreation, wildlife habitat, freshwater habitat, and anadromous fish habitat, particularly for spring-run Chinook salmon (*Oncorhynchus tshawytscha*) listed as threatened under the Federal and State Endangered Species Acts and Central Valley steelhead trout (*Oncorhynchus mykiss*) listed as threatened under the Federal Endangered Species Act. Due in part to naturally occurring low flows, agricultural diversions, channel morphology and excessive temperatures, the upstream migration of adults or downstream migration of juvenile spring-run Chinook salmon and steelhead may be impeded or blocked in some years. In 2014, conditions in Mill Creek are poorer than is typical for this time of year. Conditions may further deteriorate such that listed juvenile and adult spring-run Chinook salmon will need the restoration of suitable instream flow conditions to provide passage and/or be rescued and relocated.

WHEREAS, the flow prescriptions identified in this CESA MOU are considered by CDFW to be the minimum flows, in the current Drought Emergency, necessary to allow for adult and juvenile salmonid migration in Mill Creek below Ward Dam, and they are considered the minimum flows needed to minimize the effects of drought while balancing salmonid and agricultural interests.

WHEREAS, TNC is a private, non-profit conservation organization whose mission is to conserve the lands and waters on which all life depends.

WHEREAS, TNC owns two decreed water rights, which total 17.4 cubic feet per second, to divert Mill Creek surface water for irrigation and other purposes. TNC currently permits the Los Molinos Mutual Water Company (LMMWC) to divert its water rights for irrigation use in return for LMMWC providing an offsetting amount of water for instream flows for salmonids when requested by CDFW.

WHEREAS, TNC leases Dye Creek Ranch which abuts Mill Creek near the Upper Diversion Dam (Lease Property). TNC is willing to participate with the CDFW in fish rescue and relocation activities by allowing access through the Lease Property for the purposes of monitoring, and/or capturing and removing, and/or relocating spring-run Chinook salmon on or to Mill Creek adjacent to the Lease Property or to the Sacramento River.

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

1. Purpose

Elements of this MOU include eligibility, fish rescue efforts, designated fish passage flows, changes in the timing of diversions to provide improved instream flow and water temperature conditions which would minimize the need to rescue fish, monitoring, and evaluations of management actions. The specific elements of the program are tailored by stream and by an eligible diverting entity and as described in this MOU.

2. Methods

A. Monitoring: CDFW or its agent will carry out all monitoring activities. Monitoring and evaluation plans shall be in place to inform the effectiveness of the flow events and/or rescue efforts. Those activities may include:

- i. Use of video monitoring to determine if adult salmonids are moving through lower Mill Creek in response to minimum base flows and pulse flow events, and to determine population abundance.
- ii. Snorkel surveys may be conducted upstream and downstream of diversion structures and critical riffle areas to determine if minimum base flows are passing salmonids through these areas. It is the intent of the CDFW to detect any salmonid stranding issues before mortalities are observed, so that sufficient time is provided to inform diverters and to take proactive flow restoration or other fish rescue actions.
- iii. Monitoring of habitat conditions in Mill Creek or the Sacramento River prior to relocation of salmonids at risk, including spring run.

B. Fish Capture and Relocation: CDFW or its agent will carry out all fish capture and relocation activities. CDFW, or its agent, will notify TNC at the telephone number listed in Section 11, of all planned fish rescue/relocation activities it will carry out on

the Real Property.

- i. CDFW or its agent may relocate salmonids, including spring run, captured from elsewhere in the lower Mill Creek watershed (e.g. diversion canals), to Mill Creek adjacent to Real Property if suitable instream conditions exist, or to a suitable location on the Sacramento River.
- ii. CDFW or its agent may monitor stream depth and temperature at relocation site(s) post-relocation to determine if conditions remain adequate to keep salmonids alive and provide for salmonid passage.

3. TNC Commitments

- A. TNC agrees to provide reasonable access to CDFW and its agents, including equipment access, to the Lease Property to carry out any of the management activities listed in Section 2 of this CESA MOU for the purposes of:
 - i. Monitoring habitat conditions and salmonid abundance, size, and condition prior to any management activities;
 - ii. Capturing and removing salmonids from and/or relocating salmonids to suitable habitat, and for monitoring conditions post-relocation; or
 - iii. Monitoring stream flow conditions during flow events and/or during post-rescue/relocation to determine if conditions remain adequate to keep salmonids alive and provide for passage.
- B. TNC agrees to permit its water rights to be utilized for Required Management Elements (RME's) by Los Molinos Mutual Water Company (LMMWC) as outlined in a separate Memorandum of Understanding between CDFW and LMMWC, which is attached (Attachment 1)

4. CDFW Commitments Regarding Fish Management Activities on the Lease Property

- A. CDFW agrees that CDFW and its agents will conduct all rescue/relocation activities only after CDFW has provided the advance notice to TNC as provided in Section 2 above.

5. Authorized Take Level

Fish mortality related to diversions from Mill Creek made in compliance with the base flow and pulse flow requirements stated in this MOU is authorized under CESA. The number of spring run which may die in the course of fish capture and relocation activities conducted by CDFW is typically small (less than 10%) and is much-reduced from levels of mortality that will potentially occur in absence of carrying out this activity. As such, fish mortalities related to, or

occurring in the course of, fish rescue activities is authorized.

6. Federal Endangered Species Act

Central Valley spring-run Chinook salmon are listed as a threatened species under the federal Endangered Species Act (ESA) of 1973. In its regulations, NMFS has limited the general prohibition of taking threatened spring-run Chinook salmon under the federal ESA to allow, CDFW, its employees, and its designees to perform the rescue activities listed in Section 1 above.

TNC is not expected or authorized to assist in the handling of Central Valley spring-run Chinook salmon as a part of the fish rescue effort. Nothing in this CESA MOU authorizes any action pursuant to the federal ESA.

7. Effective Date and Termination

Unless terminated sooner by either party of the CESA MOU by giving thirty (30) days prior written notice of earlier termination, this CESA MOU shall commence on the date of execution and will terminate on **December 31, 2015**, both days inclusive.

8. Dispute Resolution

The Parties shall make reasonable efforts to resolve any disputes that may arise from this CESA MOU in a prompt and timely manner. In the event of a dispute, the Party claiming a dispute shall give verbal and written notice of the dispute to the other Parties within 5 business days. If resolution of the dispute cannot be resolved within 5 business days of the notice either party may terminate the CESA MOU through written notice. Termination of the CESA MOU will result in a loss of take coverage for future actions.

9. Amendments

Amendments to this CESA MOU may be proposed by either party and shall become effective when both parties sign a written modification to this document.

10. Applicable Law

This CESA MOU shall be construed under and governed by the laws of the State of California and of the United States, without giving effect to any principles of conflicts of law if such principles would operate to construe the CESA MOU, as amended herein, under the laws of any other jurisdiction.

11. Notice and Contact Persons

Any written notice or telephone notice required to be given by the CESA MOU, shall be deemed to have been given by the notifying party when mailed, postage prepaid or delivered to the following representatives, who will also serve as main contact people for their respective Party:

For TNC:

Gregg Werner, Senior Project Director
The Nature Conservancy
190 Cohasset Road, Suite 177
Chico, CA 95926
gwerner@tnc.org
(530) 941-4877

For CDFW:

Mr. Matt Johnson
Northern Region
California Department of Fish and Wildlife
1530 Schwab Street
Red Bluff, CA 96080
Matt.Johnson@wildlife.ca.gov
(530) 527-9490

13. Signatories' Authority

The signatories to the CESA MOU on behalf of all the Parties hereto warrant and represent that they have authority to execute the CESA MOU and to bind the Parties on whose behalf they execute the CESA MOU. This CESA MOU may be executed in counterparts.

14. Disclaimer


The CDFW shall incur no fiscal obligation under this CESA MOU.

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE EXECUTED THIS CESA MOU TO BE IN EFFECT AS OF THE DATE LAST WRITTEN BELOW.


Brian Stranko

Director, California Water Program,
The Nature Conservancy

Date: _____


NEIL MANJI

Regional Manager,
Region 1

Date: _____

The Nature Conservancy
190 Cohasset Road, Suite 177
Chico, CA 95926
(530) 897-6370

California Department of
Fish and Wildlife, Region 1
601 Locust Street
Redding CA 96001

(530) 225-2300

Attachment 1: Memorandum of Understanding between Los Molinos Mutual Water Company and the California Department of Fish and Wildlife, dated March 16, 2015.

NOTE: THE FOLLOWING PAGES OF THE TNC MOU ARE COMPRISED OF THE LOS MOLINOS MUTUAL WATER COMPANY CESA MOU.